United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

To be argued by:
William J. Quinlan

Docket No. 76-1306

B
P/S

In The

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

—v—

MICHAEL J. TICHE,

Appellant.

On Appeal From a Judgment of The United States District Court for the Northern District of New York

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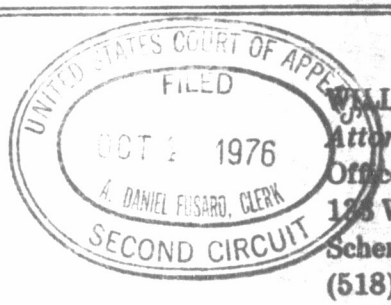
BRIEF FOR APPELLANT



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BRIEF FOR APPELLANT

QUESTIONS PRESENTED

1. Whether the failure to commence defendant's retrial within 60 days of a mistrial after a hung jury violated the provisions of a District Interim Plan, and necessitated dismissal of the Indictment with prejudice.

2. Whether the trial court's refusal to discharge the jury after its third day of deliberation and after its announcement of a deadlock was proper.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Northern District of New York (the Honorable Henry F. Werker U.S.D.J. sitting by designation), rendered July 6, 1976 after a jury trial. The judgment convicted defendant of travelling in interstate commerce for the purpose of committing arson, of transporting explosive devices and of conspiring to do so.

Defendant was sentenced to the custody of the Attorney General until discharged by the Youth Corrections Division of the Board of Parole, pursuant to 18 U.S.C. 5017(c).

STATEMENT OF FACTS

Prior Proceedings

Defendant was indicted inthe District of Connecticut with several others on May 8, 1975, and underwent a long trial with eight co-defendants in that District. The trial, which lasted from October 6, 1975 to February 11, 1976 before a jury

and the Hon. Jon O. Newman, U.S.D.J., resulted in verdicts convicting some co-defendants and acquitting others*, but, as to defendant, Michael J. Tiche, produced a jury disagreement on February 11, 1976, and a mistrial as to him. (A 9) **

On the date of the mistrial, there was in effect in the District of Connecticut a Rule 50(b) Plan, which had been amended, to conform to the interim requirements of the Speedy Trial Act of 1974, 18 U.S.C. Chapter 208. This Plan, which had been adopted by the Judges of the United States District Court for the District of Connecticut (A 87) effective September 29, 1975 (A 95), contained a specific provision governing retrials:

> "7. Retrials.
>
> "Where a new trial has been ordered by the District Court or a trial or new trial has been ordered by an appellate court, it shall commence at the earliest practicable time, but in any event, not later than 60 days after the finality of such order.' If the defendant is to be retried following an appeal or collateral attack, the court trying the case may extend such period for a total not to exceed 180 days from the date on which the order occasioning the retrial becomes final, where unavailability of witnesses or other factors resulting from the passage of time shall make trial within 60 days impractical." (A 92)

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* The convicted co-defendants are appealing to this Court in docket number 76-1140, to be argued on the same day as this appeal.

** Numerical references, preceded by "A" are to page numbers of Appellant's Appendix.

When the Connecticut jury reported it was "deadlocked" as to Michael J. Tiche, his Connecticut counsel moved for a mistrial which was granted. According to the District of Connecticut Docket Entries, Judge Newman immediately raised the question of the speedy trial aspect of any retrial:

> "Defendant Michael Tiche's Motion for Mistrial is granted for the reasons stated in open court. Court brings to the Government's attention the requirement of the Speedy Trial Act if a new trial is to be held. Government responds that they are prepared to go forward in 60 days." (A 9)

On February 19, defendant's Connecticut counsel filed a motion to withdraw (A 9).

Despite the time pressure of retrying defendant in 60 days from February 11, which was emphasized by Judge Newman on that day, nothing at all further occurred, as far as the Docket reveals, until March 4. On that date, Chief Judge Clarie ordered the retrial of defendant assigned to Judge Zampano, but provided that Judge Newman retain jurisdiction "prior to actual retrial" (A 10).

On March 11, an order was filed directing that all motions in connection with the retrial be filed by March 26 (A 10).

Thus, within this leisurely timetable, it was not until March 24 that a motion was filed by defendant's Connecticut counsel for a "change of venue" (A 11).

In a one-page "Response" on March 26 (A 70), the United States Attorney's office did not object to transferring the retrial to another District, but added:

> "The Government has filed a Notice of Readiness in this case and is ready for trial. Since a change of venue may require the appointment of separate counsel and an additional period for trial preparation, the retrial may not be begun within the required sixty-day period. The Government requests, therefore, that the Court advise the defendant of this possibility and obtain from him a waiver of the right to retrial within sixty days." (A 70)

At the argument of the Motion for transfer to another district to avoid further publicity, defendant's Connecticut counsel refused to waive any speedy trial rights of defendant (A 53, 55). Although the Assistant U. S. Attorney stated that "the likelihood of delay beyond the sixty days is great", because a new attorney would need time to familiarize himself with the case, (A 56) and although Judge Newman stated that he did not feel that a fair trial could not be obtained in Connecticut (A 58),

he ordered that the case be transferred to the Northern District of New York, (A 60 - 61) and granted the motion of defendant's Connecticut counsel to withdraw (A 12).

These orders were entered March 31, 1976, leaving only eleven days before "the required 60 days" would have run. The Order of Judge Newman, headed "Ruling on Motion to Transfer" did not refer in any way to the urgency of the speedy retrial problem, or "flag" that problem for the special attention of the Northern District of New York. (A 60 - 61).

The case did not arrive in the Northern District of New York until April 13, 1976 (A 116).
On April 14, 1976, Chief Judge Foley of that District appointed William J. Quinlan of Schenectady, New York as defendant's attorney for the retrial, and on April 15, added the case to the calendar for trial as part of the March Criminal Calendar (A 126). On April 22, 1976, Judge Henry F. Werker of the Southern District of New York was designated as the trial judge by the Chief Judge of this Court. (A 127).

A preliminary conference was held on April 19 among Judge Werker, Mr. Quinlan and the Connecticut Assistant U. S. Attorney who was to retry the case. The date of May 17 was set

for a hearing on motions, including a motion to dismiss for failure to have the retrial within 60 days (A 116).

Defendant's New York counsel made a written motion, returnable May 17, to dismiss the Indictment with prejudice on the ground that a new trial did not occur within 60 days from the date of the mistrial after the jury disagreement (A 22). (The U. S. Attorney originally took the position that the Connecticut Interim Plan was different from the New York Interim Plan and contained a "good cause" escape hatch, but later retracted that, and agreed, as did Judge Werker, that the wording of the two Plans as to the time for retrial was identical without any provision for extensions for good cause.)

Judge Werker, in a Memorandum Decision dated May 28, 1976, denied defendant's motion for dismissal (A 115). He held that although Paragraph 7 of the Connecticut Interim Plan (quoted supra) is applicable, and began to run on February 11, 1976, and although Paragraph 7 does not provide for any exceptions or extensions to the 60-day time limit, "a strict interpretation... would yield the absurd result that where the government is ready for trial, the sixty-day period for a retrial could not be extended for any reason..." (A 117).

Judge Werker further acknowledged that while other provisions of the Connecticut Plan allowed for excludable periods from time limits, Paragraph 7, relating to retrials, did not. He found, however, that a revised 50(b) Plan, to go into effect July 1, 1976 would then allow excludable periods for retrials. Thus, he stated:

> "The failure of the current interim plan to apply the periods of delay to retrial must be considered an oversight on the part of the drafters." (A 118)

Further, Judge Werker, finding no provision for excludable periods, found some in the Speedy Trial Act of 1974 and brought them over into the Interim Plan "to fill the gap" (A 118). He found the delay between February 19 to April 13 to be a delay resulting from proceedings relating to the transfer from another district, and ruled that:

> "so long as the trial of this defendant commences on or before June 13, 1976, the time limits applicable to this action will have been satisfied." (A 119)

Thus, despite the plain language of a District Plan conceded to be applicable that:

> "Where a new trial has been ordered by the District Court...it shall commence at the

> earliest practicable time, but in any event, no later than 60 days after the finality of such order",

and despite the fact that the retrial here did not occur 60 days after the finality of the mistrial on February 11, 1976, the court below, "filling in the gap" ordered the retrial to go forward. It did, and the defendant was convicted.

THE TRIAL

The Government's Case

On March 1, 1975 at 11:35 p.m., the Sponge Rubber Products Plant in Shelton, Connecticut was destroyed by fire, resulting from the detonation of explosive devices near gasoline. The fire was caused by arson, involving more than one person. (84-116)*

One of the participants, John Shaw, testified as a Government witness (126-443). He stated that he and defendant Dennis Tiche (the older cousin of defendant Michael Tiche) agreed to become participants in a plan with other defendants to blow up the Sponge Rubber plant. Shaw said that he bought the necessary implements and that at Dennis Tiche's suggestions, used defendant to help load gasoline into containers for use in the arson. (179-187)

Shaw said that he, Dennis Tiche and defendant travelled to New Haven, Connecticut together on February 2, 1975 and signed into a motel -- with the two Tiches using false names (205, 205a). Shaw further said that defendant was given $1,000 for his part

* Numerical references are to the transcript of the trial in the Northern District of New York, Docket No. 76-1306; as noted earlier, references preceded by "A" are to the Appellant's Appendix-- the trial transcript has not been reproduced in the Appendix but has been filed with the Record.

in the operation (206-207).

Shaw testified that on March 1, 1975, he and the two Tiches went to a restaurant by taxi, met the other defendants, and then went to the plant where they later laid the detonating devices and exploded them. He said three of the other defendants kidnapped guards and took them out of the plant before the burning. (207-213; 247-248).

Shaw acknowledged he had made a "deal", a "contract" and an "understanding" that for his cooperation and testimony, he would not serve any time on any State charges against him--either in Connecticut for the Sponge Rubber arson, or in Pennsylvania, for a prior arson he had committed. He further said that all federal charges against him would be disposed of by Judge Newman on sentence. (273-291)

Shaw received a sentence of five years, with parole eligibility in less than two years, and was seeking to reduce that further. (Id)

He admitted telling lies to F.B.I. agents and others and to making up plausible but false stories. (294-305)

Shaw admitted being a user of amphetimines, marihuana and laughing gas. (420)

Several persons who had been inside the plant when defendant was said to have been there testified but none could identify defendant. (444-469)

The only positive evidence, apart from Shaw, that defendant had been inside the plant came from an F.B.I. fingerprint expert, Oliver. He testified that a box taken from an automobile driven by a co-defendant had a latent fingerprint of defendant. Oliver said he had obliterated the print while working on it, but identified a photograph of the single fingerprint as being from the box and belonging to defendant. (578-614)

The F.B.I. agent in charge of the case testified it was the largest arson case he had ever worked on, and that dozens of agents in many field offices had been involved. (649; 654) Yet, only one fingerprint and no positive identification of defendant were produced -- other than the word of the cooperating witness, Shaw.

The Defense Case

The defense produced the girlfriend of defendant who testified that on the night that Shaw said defendant was loading gasoline, he was with her all evening and all night and thus could not have done what Shaw said he had. (715-725)

Jury Deliberations

The trial began on Monday, June 7, 1976 and testimony was completed on Friday, June 11. Following summations and the Charge by the court, the jury received the case on Monday afternoon, June 14. (A 14)

The jury deliberated until 10:00 p.m. Monday night, and all day Tuesday, until 5:00 p.m., when it was sent home for the evening. (A 199, 203)

On Wednesday at 11:10 a.m., the jury sent a note that

> "We, the members of the jury, cannot reach an agreement on any of the counts." (A 205; 183)

Judge Werker stated to counsel that he proposed "to have them sit a little longer" and then give a modified Allen charge (A 205).

Defense counsel objected, and specifically calling attention to and citing two Second Circuit decisions, United States v. Goldstein, 479 F.2d at 1068, and United States v. Beckerman, 516 F.2d at 905, said the appropriate factors to consider were the scope of disagreement and the determination whether further deliberations might produce some agreement. (A 205-207)

The Court stated that since the defendant had been through two trials he was entitled to a verdict. Counsel replied:

> "MR. QUINLAN: Speaking as the defendant's lawyer, I say the defendant would be and is satisfied with it as it is now.
> Is that correct, Mr. Tiche?"
>
> "THE DEFENDANT: Yes, that's right." (A 207)

The Court then gave a modified Allen charge (A 208), and counsel's objection was noted (A 212).

The Court then stated "We certainly will not go beyond 5 o'clock" (A 212), but when the jury asked for further testimony, the Court decided to have the jury return on Thursday. (A 215-217)

On Thursday afternoon, June 17, at 4:15, defense counsel requested that if the jury had not returned a verdict by 5:00 p.m.:

> "the Court make an inquiry of them of the scope of disagreement among the jurors to determine whether further deliberations might produce some agreement." (A 225)

The Court denied the motion.

It was not until noon the following day, Friday, June 18, that the Court finally asked the questions requested. Then, at 1:30 p.m., the jury returned a verdict of conviction. (A 234)

ARGUMENT

POINT I

THE FAILURE TO COMMENCE DEFENDANT'S RETRIAL WITHIN 60 DAYS VIOLATED THE CLEAR, DIRECTORY REQUIREMENT OF THE DISTRICT INTERIM PLAN AND THE INDICTMENT SHOULD THEREFORE BE DISMISSED WITH PREJUDICE

The central issue here is whether the plain, unambiguous and directory language of the District of Connecticut s Interim Plan that a retrial "shall commence...in any event, not later than 60 days" is to be honored or ignored.

This clear wording was part of a duly adopted Rule 50(b) Plan, and, as with all such Plans, first underwent review and approval by the Judicial Council of this Circuit. The power of the District Court to adopt such a Plan, including setting a time limit on retrials, has been validated explicitly by this Court. United States v. Furey, 514 F.2d 1098, 1104-1105 (2d Cir. 1975); see Hilbert v. Dooling, 476 F.2d 355, (2d Cir. 1972), cert. denied 414 U.S. 878 (1973).

Much of the difficulty on the part of the court below was based on its dislike of the flat, but clear, directive that no more than 60 days could elapse before a retrial could begin--without any exceptions or excludable periods for any delay

whatever. Other parts of the Connecticut Interim Plan did allow for delays of other time limitations, as in Paragraphs 5 and 6 of that Plan (A90-91), but the limit on retrials was without exceptions, and was recognized as such in the opinion of the court below.

This Court, it is submitted, already has dealt with the question and held that the "command" of such a provision to hold a retrial in the time directed in the Plan must be upheld.

In United States v. Drummond, 511 F.2d 1049 (2d Cir. 1975), this Court passed upon a provision in an Eastern District Plan for Achieving Prompt Disposition of Criminal Cases. The rule there required that a new trial following an appeal:

> "...shall commence at the earliest practicable time, but in any event, not later than 90 days after the finality of such order unless extended for good cause." (511 F.2d, at 1051).

The Government argued that any delay was not attributable to it, and that the retrial rule should not be read literally but as part of "an integrated speedy trial plan, which has as its goal the elimination of prosecutorial delay." (Id., at 1051). This Court ruled:

> "The difficulty with the Government's position is that the language of Rule 6 is squarely

against it. Rule 6 does not say, as do other Rules in the Plan, that the Government must be ready for trial within 90 days; it says that the new trial 'shall commence' by the specified time limit."

"...As compared to the earlier Second Circuit Rule, Rule 6...reduced the period allowed for retrial from six months to 90 days and substituted a command that the retrial commence by the specified date for the requirement merely that the Government be ready... we do not see how the plain language of Rule 6 can be ignored." (511 F.2d at 1051-52)

The wording of the Connecticut Plan is as plain as that of the Eastern District in Drummond, and its "command" as binding. Paragraph 7 of the Connecticut Plan allows exceptions for good cause only on retrials following an appeal or collateral attack. As for a new trial ordered by the District Court, that, the Plan commands:

"shall commence at the earliest practicable time, but in any event, not later than 60 days after the finality of such order."*

The words "shall commence" and "in any event, not later" are plain, not ambiguous and directory -- in short, a command.

---

* The District of Connecticut Docket Entry of February 11, 1976 of Judge Newman's granting of a mistrial and warning the Government that it must commence any retrial within 60 days leaves no doubt that his order was "final" on that date. (A 9)

In Drummond, this Court underlined the impact and significance of its ruling that retrials must be held within the time limits of the District Plans and stated that it would not tolerate delays in the future. It directed that both the United States Attorney and the judge to whom a retrial is assigned "should closely monitor its progress", lest, under the Speedy Trial Act of 1974 the Government would "face dismissals of indictments involving serious charges". (511 F.2d at 1054).

Again, in United States v. Roemer, 514 F.2d 1377 (2d Cir. 1975), the Court found "good cause" to excuse a late retrial after an appeal, but in even firmer language than in Drummond expressed its "serious concern" at the delay in the retrial and stated:

> "We...take this opportunity to remind district courts and government attorneys of their present responsibility to keep abreast of developments in cases to which they are assigned. Measures must be taken both in the offices of the courts and the offices of the government prosecutors to flag the time requirements in all criminal cases. Failure to do so in the future will not be treated lightly." (514 F.2d at 1382).

Both cases were decided in 1975, and the court and prosecutor in Connecticut were chargable with knowledge both of their holdings and of their stern warnings to commence retrials within the time limits of the District Plans.

Initially, and promptly, Judge Newman on the same day he granted a mistrial due to the hung jury in Connecticut, February 11, 1976, warned the Government on the record of the requirements of a speedy retrial, and the Government responded that it was ready to go forward in 60 days. (A 9)

Thus, Judge Newman "flagged" the speedy retrial problem and the U. S. Attorney acknowledged seeing the flag flying. Unfortunately, events slowed down to a leisurely crawl, despite the running of the 60-day time clock.

Although defendant's Connecticut counsel promptly moved to be relieved on February 19, the hearing on that and other motions (including the motion to transfer to a different district) were not even scheduled to be returnable until March 26--well over half way into the 60 days that started running on February 11.

The Government's acknowledgment of the 60-day limit is plain from its "Response" to the motion to transfer (A 70) wherein it stated that such a change might require new counsel and "the retrial may not begin within the <u>required</u> sixty-day period." (A 70 , emphasis supplied). Further, at the oral argument of the motion to transfer on March 29, the

Assistant U. S. Attorney told the district court that the likelihood of delay "beyond the sixty days" was "great" (A 56).

Notwithstanding the plain awareness of the 60-day limit on a retrial, the court relieved defendant's counsel and transferred the case to a new district, necessitating a new lawyer who would, as the Assistant U. S. Attorney pointed out, need time to familiarize himself with the case. All of this was done without any waiver of defendant's right to a speedy retrial. (A 55)

By the time the case arrived in the Northern District of New York, the time limit commanded by the Connecticut Plan had already expired. A prompt motion to dismiss for this reason was made by defendant.

Confronted by this situation, Judge Werker, in his Memorandum Decision denying the motion (A 115) did not dispute that the Connecticut retrial command of 60 days was in effect, but refused to apply it because, since it had no exceptions, it could, he said, lead to an "absurd result". He also said that the wording would be changed in a revised Plan to go into effect in the future.

To paraphrase this Court's language in Drummond, the difficulty with the court's position is that the language of

Paragraph 7 is squarely against it. It is a "command" and it cannot be seen how the plain language of Paragraph 7 can be ignored. (See United States v. Drummond, supra, at 1051-52).

It is no answer to state, as did the court below, that the absence of exceptions to the requirement of starting a retrial in 60 days "must be considered an oversight on the part of the drafters." The Plan was adopted after full consideration by the Judges of the District of Connecticut and after review and approval of the Judicial Council of the Second Circuit. Its language is clear; it is a direct command which must be followed, despite distaste.

The Court below viewed the absence of exceptions in Paragraph 7 of the Connecticut Plan as "a gap", which it proceeded to fill by turning to the Speedy Trial Act, 18 U.S.C., sec. 1361, et seq.

This abandoning of a valid District Plan, duly promulgated and in effect, was not only unwarranted but unnecessary. The Connecticut Plan, approved by the Circuit, expressly states in its opening paragraph that it is adopted "Pursuant to the requirement of Rule 50(b)...and in conformity with the provisions of the Speedy Trial Act of 1974..." (A 87 , emphasis supplied). (Indeed, the languare of Paragraph 7 of the Connecticut Plan is

substantially identical with that of sec. 3161(e) of the Speedy Trial Act, which itself provides for no exceptions to the 60-day time limit on retrials.)

It was wholly unnecessary to turn to the morass of the Speedy Trial Act,* since this Court has found that the re-trial provision therein "is not effective even in part until July 1, 1976." United States v. Yagid, 528 F.2d 962 (2d Cir. 1976), at 966, note 9.

The validity of the Connecticut Plan relating to re-trials is as clear as the wording of that Plan's command to commence a retrial in any event not later than 60 days. That was not done here, despite the responsibility of the Connecticut court and government counsel -- of which they were aware -- to start the retrial no later than April 11, 1976.

This could have been done by hearing all pre-trial matters early, especially after the early warning signal of defendant's lawyer's application to withdraw. Instead, six weeks out of the eight available were allowed to pass before even a hearing on these questions was held. Once defendant's Connecticut counsel was permitted to withdraw, and the retrial

* This statute was termed "so inartfully drawn" by the Court in United States v. Tirasso, 532 F.2d 1298 (9th Cir. 1976).

transferred to another district, it was inevitable that the time available under the Plan would run out -- as it did, even before the case arrived at the new district.

This Court's strong warnings to court and government counsel in Drummond and Roemer (supra) to flag retrial time limits and to keep abreast of cases involving them were not heeded sufficiently in Connecticut in this case. The time ran out and the defendant was put to a retrial that started fatally too late.

While this problem is unlikely to recur in the same context, since a revised District Plan, effective July 1, 1976 is now in effect, the rights of defendant must be dealt with under the provisions of the Plan in effect at the time of his retrial. Those rights are clear -- he was entitled, under the plain wording of that Plan, indeed the "command" of the Plan, to be retried no later than 60 days from February 11, 1976. His conviction at a retrial, which began June 7, 1976, over his objection, should be reversed.

The reversal should be with prejudice, because of circumstances weighing heavily against reindictment (see United States v. Yagid, 528 F.2d 962 at 967 (2d Cir. 1976).

This appellant was a peripheral defendant in the alleged criminal arson with the other defendants who are appealing simultaneously in docket number 76-1140, as the record in that appeal makes clear. Defendant already has been put to two trials, one lasting four months in Connecticut and the second lasting two weeks in the Northern District of New York. If the federal indictment is dismissed with prejudice, defendant still faces prosecution for arson in the State of Connecticut, where he has been indicted and is awaiting trial (A 76). It is submitted that in view of these circumstances, a dismissal without prejudice, necessitating a third federal trial of this peripheral young defendant is not required in the interests of justice.

POINT II

THE TRIAL COURT SHOULD HAVE MADE INQUIRY OF THE JURY AS TO THE SCOPE OF ITS DISAGREEMENT AND WHETHER FURTHER DELIBERATION MIGHT PRODUCE AGREEMENT BEFORE ALLOWING IT TO RESUME AFTER A DEADLOCK

In defendant's first trial, the jury deliberated from January 14 to February 11, 1976 for 16 days, and was unable to reach a verdict as to him (although it did return verdicts as to his co-defendants).

In the second trial, the jury deliberated 33½ hours, over five days, from June 14 to June 18, 1976, until they finally -- following a modified Allen charge -- returned a verdict. The Allen charge was given on the third day of deliberation, following a note that:

> "We, the members of the jury, cannot reach an agreement or any of the counts." (A 187)

The chronology of the ensuing events already has been set forth in the Statement of Facts herein, (pages 12 and 13 supra).

It is submitted that defendant's counsel's requests, both before and after the Allen charge, that the court inquire

of the jury the scope of its disagreement and whether further deliberations might produce some agreement were consonant with the evolving trend in this and other courts. Counsel specifically referred, on the record, at the time he requested such inquiry, to two decisions of this Court: United States v. Goldstein, 479 F.2d 1061 (2d Cir. 1973) and United States v. Beckerman, 516 F.2d 905 (2d Cir. 1975) and to the American Bar Association Standards Trial By Jury sec. 5.4(c).

After a long series of decisions in this Court approving the giving of an Allen or modified Allen charge, there seems in the past three years to be an indication that the Court might be taking a different view. In 1973, in Goldstein, the Court stated:

> "Requiring a jury to continue deliberations despite genuine and irreconcilable disagreement more often than not defeats the ends of public justice; not only will such compulsion needlessly waste valuable judicial resources, it may coerce erroneous verdicts." (479 F.2d at 1068).

Again, in United States v. Beckerman, 516 F.2d 905 (2d Cir. 1975), this Court stated:

> "The rejection of the Allen charge imports an awareness of the danger of coercing an erroneous verdict. Cf. United States v. Goldstein, supra,...United States v. See, 505 F.2d 845, 852 (9th Cir. 1974). The issues were not complicated and were submitted after a relatively short trial."

The Ninth Circuit decision, in United States v. See, 505 F.2d 845, cited with approval by this Court, favors inquiry of a jury after a reported disagreement, as to whether it should continue, instead of an Allen charge without any inquiry.

The trial of this defendant was short, consisting of one week of testimony. The issues were relatively uncomplicated, namely whether to believe the cooperating government witness and whether to accept the government's fingerprint expert's testimony. Thus, when in its third day of deliberation, the jury reported it could not reach agreement, the request for an inquiry as to the scope of its disagreement and whether further deliberations could produce agreement should have been granted. This is particularly so in view of counsel's specific citations of the cases approving such inquiries to the trial court at the times such requests were made.

It is submitted that here, after the total inability of the jury to reach agreement in defendant's first trial, and after days of disagreement in the second trial, defendant was at least entitled to have the questions put to the jury that his counsel requested before any modified Allen charge was given.

CONCLUSION

It is respectfully submitted that the Indictment herein should be dismissed, with prejudice.

WILLIAM J. QUINLAN
Attorney for Appellant

Schenectady, New York
October 4, 1976.

Affidavit of Service

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